

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): E.T. Best et al.
Appl. No.: 10/725,120
Conf. No.: 3342
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Title: MELT-RESISTANT FUDGE ARTICLE AND METHODS OF USING SAME
Art Unit: 1761
Examiner: A.O. Pearse
Docket No.: 112701-519

AFFIDAVIT UNDER 37 C.F.R. § 1.132

Sir:

I, Darryl Richard BARWICK, hereby state as follows:

1. My experience and qualifications are as follows:
Degree in Food Technology from Michigan State University. Thirty-one years experience in sweet snacks product development, more specifically in confectionery and chocolate product development. Responsible person for the practical bench-work development of the present invention.
2. I am a named inventor of the above-identified patent application and am therefore familiar with the inventions disclosed therein.
3. I have reviewed the outstanding Office Action dated September 7, 2006 pending against the above-identified patent application. In addition to considering the outstanding Office Action, I have reviewed the references cited therein as well as the pending claims. I believe that the anticipation and obviousness rejections of Claims 1-22 based on U.S. Patent No. 4,081, 559 to Jeffery et al. ("*Jeffery*") are based on a misunderstanding of the reference and the pending claims. The basis for my opinion is set forth below.

4. The present invention is directed, in part, to a melt-resistant fudge article that comprises a liquid fat component, for example, in an amount sufficient to minimize external adhesiveness of the article. The liquid fat component is in liquid form at room temperature. In one embodiment, the liquid fat or oil component can comprise coconut oil and soy oil. In another embodiment, the liquid fat or oil component can comprise a mixture of coconut and soy oils. Further, the choice of liquid fat used not only helps minimize or avoid adhesiveness, but also helps provide desirable in-mouth textural characteristics.

5. The present invention relates to increasing the adhesion resistance of melt-resistant fudge articles by lubrication from the liquid fat component, e.g., fluid oil. The fluid fat or oil that resides at the open ends of the pores at the very outside edges of the final melt-resistant fudge article can provide a trace of surface lubrication to facilitate adhesion resistance, particularly to wrapping materials. If too much solid fat is incorporated, then the degree of lubrication becomes undesirably minimized or prevented. Moreover, use of a liquid fat component can help provide desired in-mouth textural characteristics. Therefore, use of a liquid fat component can provide specific advantages not obtained with the use of a solid fat.

6. As one having ordinary skill in the art, I believe that *Jeffery* fails to disclose or suggest a liquid fat or oil in the products disclosed therein. Instead, *Jeffery* is entirely directed toward a product using solid fats, i.e., fats that are solid at room temperature. For example, *Jeffery* teaches using hardened fats such as cocoa butter, hardened palm kernel oil or a cocoa butter replacement fat in the detailed description of his invention. *Jeffery* also teaches using hardened palm kernel oil in Example 2. As a result, as one having ordinary skill in the art, I would assume that only hard fats should be utilized by reading *Jeffery*.

7. As one having ordinary skill in the art, I believe that none of the fats disclosed by *Jeffery* are inherently liquid at room temperature. All of the embodiments of *Jeffery* use cocoa fat. Cocoa butter is a complex, hard fat made up mostly of triglycerides, it remains firm at room temperature, then it contracts as it cools and solidifies. It is ideal for molding. Moreover, all of the fats suggested by *Jeffery* should be in the same solid form as cocoa butter in order to be a

suitable partial fat replacement for cocoa butter. Because liquid fats or oils have distinguishable structure and components when compared to fats in solid or hardened form, I believe that utilizing a liquid fat in *Jeffery's* product would render the product unsuitable for its intended purposes. As a result, *Jeffery* has no need for using a liquid fat in his product and does not inherently teach using a liquid fat.

8. For all the foregoing reasons, as one having ordinary skill in the art, it is my opinion that *Jeffery* only teaches a product using solid fats. I also believe that, because *Jeffery* teaches that hardened fats or fats in solid form are specifically suited for his product, *Jeffery* does not inherently teach using any liquid fat in his product.

I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001, Title 18, United States Code, and that willful false statements may jeopardize the validity of this patent and any patent issuing therefrom.

Date: February 5, 2007

Darryl Richard Barwick

Name: Darryl Richard BARWICK